



**DISCIPLINING STUDENTS
WITH DISABILITIES: THE BIG PICTURE**

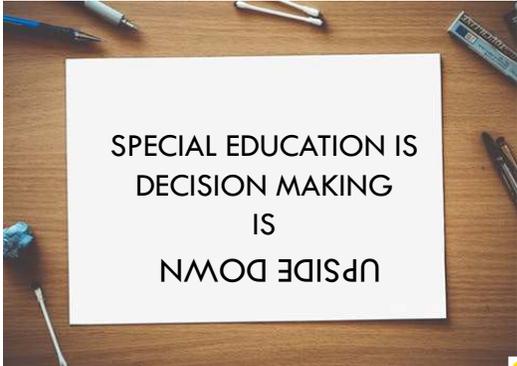
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If you had to describe the discipline process for students in your District with just one movie title -- which one would you select?

- a. *Dazed and Confused*
- b. *It's a Wonderful Life*
- c. *Psycho*
- d. *Dirty Harry*

Dazed and Confused (1993). [Film]. United States: Gramercy Pictures (I)
 It's a Wonderful Life (1946). [Film]. United States: Liberty Films (II)
 Psycho (1960). [Film]. United States: Shamley Productions
 Dirty Harry (1971). [Film]. United States: Warner Brothers





**SPECIAL EDUCATION IS
DECISION MAKING
IS
UPSIDE DOWN**



Special Education Decision Making is Upside Down

- Public education operates (mostly) top down.
- Decisions come from the top based on budget, personnel allocation, resources, management concerns, etc.
- But in special education, top down decision making leaves the district vulnerable.
- It's "upside down" in special education.

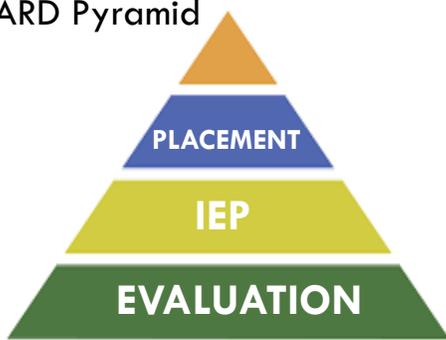


We Can't. We Don't. We Won't. ...and Kevin Costner

- The district creates a one-size fits all ESY program.
- Special education kids leave 15 minutes early every day because we don't have enough buses.
- We put a ceiling on certain services.
- The principal dictates what the IEP Team will do without reference to the evaluation data.?



The ARD Pyramid



LET'S SAY IT AGAIN

- All decisions about IEP content and placement should be based on evaluation data specific to this child.
- This means amount of services, including related services.
- Because of this, there is a safe, legally defensible response to just about any parent request.....







“Experience shows that schools can be places of special danger.” Justice Alito: Frederick v. Morse (2007)



How to resolve the tension ...

- For the most part, the tension between the competing duties of safety/discipline and special education rights must be resolved INDIVIDUALLY by each student's ARD committee.
- But there are also tools that can be accessed.

"Knowledge counts but common sense matters."
-LouAnne Johnson, *Dangerous Minds*

Dangerous Minds (1995). [Film]. United States: Hollywood Pictures



Common Sense: How to Resolve the Tension

- The ARD committee's responsibility
- The role of your campus administrators

"What is so dangerous about a character like Ferris Bueller is he gives good kids bad ideas. Last thing I need at this point in my career is 1,500 Ferris Bueller disciples running around these halls. He jeopardizes my ability to effectively govern this student body..."

- Mr. Rooney, *Ferris Bueller's Day Off*

Ferris Bueller's Day Off (1986). [Film]. United States: Paramount Pictures



ADDRESSING STUDENT BEHAVIOR THAT IMPEDES LEARNING

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Behavior That Impedes Learning

- ARDCs should ask: does the behavior impede learning?
- If YES, then ARDC MUST consider interventions, etc.
- Include them in the IEP.



BIP v. Code of Conduct

BIP:

Positive
Proactive
Applies to one
Agreed to
Parent consent
What we do FOR

Code:

Negative
Reactive
Applies to all
Imposed by school
Notice to parent
What we do TO



THE DEPARTMENT OF EDUCATION
WEIGHS IN ON POSITIVE
BEHAVIOR INTERVENTIONS

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Administrative Authority

- “The Department strongly supports child and school safety, and this letter is not intended to limit the appropriate use of disciplinary removals that are necessary to protect children.”
- But the letter seeks to help “educators actively prevent the need for short-term disciplinary removals....”
- “This requirement applies to all IEP Teams, regardless of the child’s specific disability...”



- Dear Colleague(DOE 8/1/2016) reminds us that Districts are required to consider PBIS when behavior impedes learning.

“That might sound boring, but I think the boring stuff is the stuff I remember the most.”

- Russel, Up

Up (2009), [Film], United States: Pixar Animation Studios



About ISS

- ISS and frequent flyers – are you teaching replacement behavior or reinforcing it?



“Go ahead, make my day”
- Harry Callahan, *Sudden Impact*

Sudden Impact (1983), [Film], United States: Warner Brothers



What Comes Through Loud & Clear:

Suspensions don't work. Use them for safety purposes only and only if necessary.

Use "evidence based practices."

Have a school-wide approach.

ALWAYS consider if behavior is impeding learning; and if it is, do something positive about it.



MANIFESTATION DETERMINATIONS

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WHY?

- The process is designed to make sure we are not discriminating on the basis of disability, not punishing the student, or depriving the student of educational services because of disability.
- Not intended to be a loophole for kids to avoid accountability.



WHEN?

- Under IDEA “within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.”
- Remember that “change in placement” can be one long term action, or a “pattern” of short term actions.
- Short term removals create a change in placement only when they exceed 10 days, have some degree of proximity and are for “substantially similar behaviors.”

W3

Two Questions:



1. Was the conduct the direct result of the school's failure to implement the IEP?
2. Was the conduct caused by, or had a direct & substantial relationship to, the child's disability?

“You can't handle the truth!”

- Col. Nathan R. Jessup, *A Few Good Men*

A Few Good Men (1992). [Film]. United States: Columbia Pictures Corporation

W3

If The Conduct Is NOT Related To The Disability

If behavior is not a manifestation, the student is subject to the code of conduct as a general ed student would be for similar behavior.

But student is still entitled to FAPE, which must be determined by ARDC.

Be prepared to make adjustments to DAEP to meet needs of the student.

W3

If The Conduct Is Related To The Disability

DON'T PUNISH IT
DON'T IGNORE IT

IEP Team Must:

1. Conduct a Functional Behavioral Assessment.
2. Implement a Behavior Intervention Plan, if one isn't in place.
3. Review the Behavior Intervention Plan, if one is already in place.
4. Return the child to the last placement, absent special circumstances defined by law.

Placement CANNOT change unless you have parent agreement or "special circumstances."



Cypress-Fairbanks Indep. Sch. Dist., 118 LRP 24717 (SEA TX 05/02/18)

- Student qualified for special education as a student with an Other Health Impairment.
- The alleged incident occurred off campus in January 2018.
- The infraction required mandatory DAEP placement.



Cypress-Fairbanks Indep. Sch. Dist. - Continued

- MDR ARD committee considered information from Student's Special Education teacher as to Student's current functioning, the characteristics of a student with an OHI, Student's PLAAFP and Student's progress towards mastery of Student's IEP goals and objectives.
- Experienced LSSP familiar with the Student took part in MDR and informed the committee that she did not find a causal or direct link between the Student's alleged conduct and Student's disability.
- LSSP further discussed her opinion that diminished cognitive functioning, like Student exhibits, would not cause a person to take the actions taken by the Student.
- Based on information available, ARD also considered whether intellectual disability or emotional disturbance caused or directly and substantially contributed to the alleged conduct, and determined it did not.



Cypress-Fairbanks Indep. Sch. Dist. -
Continued

- ARD committee determined that the alleged conduct was not a result of the District's failure to implement the IEP.
 - Special education teacher described daily use of interventions consistent with BIP.
- ARD committee concluded, over parent's disagreement, that Student's conduct was not a manifestation of Student's disability.
- District imposed a disciplinary placement of 30 days.
 - Not DAEP, tailored placement for student needs.

Cypress-Fairbanks Indep. Sch. Dist. -
Continued

- Parents argued that the student was not capable of understanding the District's Code of Conduct and should therefore not be disciplined.
- Hearing Officer held - While the Student's ARD committee found that the Student was not capable of understanding and following school rules as outlined in the Student Code of Conduct, this did not mean the Student may not be disciplined for alleged off campus conduct that the ARD committee finds is NOT a manifestation of disability.
 - MDR ARD considered all relevant information.
 - Student's educators and other professionals present also found no direct link.
 - Evidence showed the alleged conduct was not a result of the District's failure to implement Student's IEP.
 - Student's BIP adequately addressed Student's known behaviors
 - Student's alleged conduct occurred off campus
- The Petitioner's appeal of the manifestation determination and disciplinary placement **DENIED**.



J.H. by L.H. v. Rose Tree Media Sch. Dist.,
118 LRP 38235 (E.D. Pa. 9/17/18)

- Student was a 15 year old with ADHD and SLD.
- Student's disability manifested as impulsivity and low tolerance for frustration.
- Student arranged for a friend to film him assaulting a schoolmate in the school cafeteria.



J.H. by L.H. v. Rose Tree Media Sch. Dist. –
Continued

- MDR participants: Psychologist, secondary supervisor of special education, assistant principal, counselor, regular education teacher, special education teacher, Student and Student's grandfather.
- To ensure that the MDR team had up to date data, the psychologist spent three to four hours reading and reviewing records.
- Team reviewed the relevant records and collected input from the teachers, psychologist, counselor and the Student.
- The District determined the conduct was not a manifestation of Student's disability and expelled him.



J.H. by L.H. v. Rose Tree Media Sch. Dist. –
Continued

- Expedited Request for Due Process Hearing filed.
- Plaintiff's video argument.
 - District deleted additional video footage.
 - Some team members did not review the preserved videos.
- "MDR attendees shall review all relevant information in the student's file. But each member of the review team need not review the entire file."



J.H. by L.H. v. Rose Tree Media Sch. Dist. –
Continued

- Special Education Hearing Officer held that the MDR was appropriate.
 - MDR team cant focus on the traits typically associated with the student's disability, it must consider how the disability impacts the student specifically.
 - Student's ADHD manifests as impulsivity. Evidence that the student arranged for his misconduct to be documented on camera. Critical factor for the MDR.
- U.S. District Court for the Eastern District of Pennsylvania upheld the Special Education Hearing Officer's decision that the Student's misconduct was not a manifestation of his disabilities.



SPECIAL CIRCUMSTANCES



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“Do or do not, there is no try.”

- Yoda, *The Empire Strikes Back*

The Empire Strikes Back (1980), [Film], United States: Lucas Films



- Principals can order removal to IAES (Interim Alternative Educational Setting) for up to 45 school days without regard to manifestation in three cases:
 - Carrying or possessing a weapon;
 - Knowingly possessing, using, selling or soliciting the sale of illegal drugs;
 - Inflicting “serious bodily injury.”
- Note: offense must take place at school or school function.
- Still need to conduct MDR



What is Serious Bodily Injury?

A bodily injury that involves:

1. Substantial risk of death;
2. Extreme physical pain;
3. Protracted and obvious disfigurement;
4. Protracted loss or impairment of the function of a bodily member, organ or mental faculty.

18 U.S.C. 1365(h)(3).



Does a Broken Nose Suffice?

- Apparently not. See *Pocono Mountain School District*, 109 LRP 26432 (SEA Pa. 2008).
- Hearing officer decisions have consistently concluded that injuries are not “serious” enough to meet the federal definition.



What about Rape?

- According to OSERS Q and A document: “Certain federal cases have held that rape met this definition of serious bodily injury because the victim suffered protracted impairment of mental faculties.”
- See 2009 Q and A, Question B-1, 52 IDELR 231.



THE ROLE OF LAW ENFORCEMENT



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"I don't make things complicated. That's the way they get, all by themselves."

- Martin Riggs, *Lethal Weapon*

Lethal Weapon (1992), (Film), United States: Ocean Software



What about the Police?

"We have deliberately omitted from this list of examples any reference to law enforcement authorities due to our recommendation to schools, described in the Department's Guiding Principles: A Resource Guide for Improving School Climate and Discipline that school resource officers not be involved in routine disciplinary matters."

Dear Colleague (DOE 8/1/2016)



When to get the law involved and related requirements

- IDEA expressly acknowledges that school officials can report alleged crimes to law enforcement.
- As OSERS notes in the Q and A: "Under most State and local laws, school personnel must report certain crimes that occur on school grounds to the appropriate authorities."



The Controversy

- Schools are getting much criticism over the use of criminal procedures, like ticketing and citations, for minor offenses.
- No one questions the authority of the school to file criminal charges for serious misconduct.



Records Requests

- When reporting a possible crime, you must send copies of the "special education and disciplinary records" for consideration by the authorities to whom you report.
- But this transmission of records must be in conformity with FERPA. Therefore, you must have parental consent, or fit within an exception to parental consent.



ADDITIONAL RECENT CASES

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Montuori and Bayard ex rel. A.M. v. District of Columbia, 118 LRP 39733 (D.D.C. 9/26/18)

- Middle school student with ADHD and ED.
- Testimony showed that while the teachers had, and were implementing, Student's BIP, the employees in charge of discipline at the Student's school did not know he had a BIP and therefore did not use it when addressing his behaviors.
- Negative behaviors were addressed through disciplinary measures including regular ISS.



Montuori and Bayard ex rel. A.M. v. District of Columbia - Continued

Holding:

- District denied the Student FAPE - failed to implement his behavior intervention plan.
 - Reliance on in-school suspensions and other disciplinary measures not found in the student's BIP resulted in a loss of instructional time and a denial of FAPE.
- Districts must ensure that all relevant personnel are aware of the student's BIP and know how to implement it properly.
- Remanded to the Special Education Hearing Officer for a determination of appropriate compensatory services.



S.H. v. Rutherford County Schs., 118 LRP 39735 (M.D. Tenn. 9/26/18)

- Student was a 12 year old female with Prader-Willi syndrome, a genetic condition which can affect learning and cause behavioral problems.
- Parents filed a Request for Due Process Hearing alleging denial of FAPE and requesting residential placement.
- Administrative Law Judge dismissed the matter. Parents then filed with the District Court.



S.H. v. Rutherford County Schs. – Continued

- At trial evidence showed:
 - Special education teacher genuinely attempted to address the student's behavior (outbursts and aggression).
 - Interventions sometimes resulted in student's removal to another setting, resulting in loss of instructional time.
 - Expert on Prader-Willi syndrome testified that the reactive approach was not effective. ALJ should not have discounted expert's testimony.
 - "I'll be with you in one minute."
 - Offering food as an incentive.



S.H. v. Rutherford County Schs. – Continued

- A district cannot develop appropriate behavioral interventions for a student with a disability if it doesn't fully understand the student's impairment.
- IEP team may need to contact an expert for insight when dealing with a student that has a rare disability.



S.H. v. Rutherford County Schs. – Continued

- District found to have denied FAPE.
 - District used ineffective interventions to manage Student's behavior.
- Plaintiff requested relief was residential placement.
- Judge ordered the District to (1) provide formal training on Prader-Willi syndrome to all staff members who worked with the student, (2) meet with the parents to develop an appropriate BIP, and (3) reimburse Plaintiff's attorney's fees.



Huntsville Indep. Sch. Dist., 118 LRP 21098 (SEA TX 3/19/18)

- At the time the DPH was filed, Student was a 4th grade student with ED and OHI (ADHD).
- Student was in all general education classes with one hour of resource.
- Student received inclusion support for Reading and Math.
- Student received counseling twice a week for 20 minute sessions.



Huntsville Indep. Sch. Dist., 118 LRP 21098 (SEA TX 3/19/18)

- Student's BIP identified 4 target behaviors: verbal aggression, physical aggression, non-compliance and elopement.
 - From August 16, 2017 through December 12, 2017, Student exhibited one or more of these behaviors every day.
 - 122 incidents of physical aggression
 - 102 incidents of verbal aggression
 - 301 instances of non compliance
 - 94 instances of elopement
- Despite multiple ARD meetings to address behavior and to review and revise the BIP, Student's behaviors continued.
- District conducted an FBA, based on FBA and Student data, the District proposed changing student's placement to a special education setting for core classes.
- Parent filed DPH to invoke stay-put.



Huntsville Indep. Sch. Dist. - Continued

- District then engaged experienced outside BCBA to conduct a second FBA.
- Based on BCBA recommendation and District data, the District proposed a change in placement to the District's Behavior Support Classroom.
- Parent filed second DPH to invoke stay put.



Huntsville Indep. Sch. Dist. - Continued

- Hearing Officer found:
 - The District developed and implemented an IEP and BIP for the student that was based upon comprehensive evaluations and targeted the Student's specific behavioral issues.
 - It was not until the District's **significant** efforts to implement the IEP and BIP in the general education setting were unsuccessful that the District proposed a revised IEP and placement in a different classroom.
 - District made significant efforts to provide Student with supplemental aids and services and modify the curriculum for Student but Student was unable to make progress in his IEP and received little if any educational benefit and caused considerable disruption to the education of the other students in the general education setting.
 - IEP was calculated to meet the Student's unique needs.
 - Mother was an active participant in the IEP meetings.



What are the roles of the school board in special education?

- Look at achievement and placement data. Are children with disabilities progressing academically? Are children with disabilities interacting with their peers (both disabled and non-disabled)? What is being done to grow progress and integration?
- Look at the resources committed to special education. Do special educators have the tools that they need? Are they used wisely? Can partnerships help use resources more efficiently? Take seriously requests from your special education departments regarding needed personnel and services.
- Look at the placement options available. What plans does the district have for children with more complex needs? What relationships or partnerships does the district have?
- Look at the budget. Are special education funds being used for special education purposes, and only for special education purposes?



What is not school board responsibilities?

- Making eligibility, programming, or placement decisions.
- Except in very rare circumstances, serving on an IEP team. Does a school member have the qualifications to serve as the District representative or have "knowledge or special expertise regarding the child"?
 - School board member who sits in on IEP team meetings to ensure cost containment is in violation of special education law. *Letter to Anonymous*, 18 IDELR 969.
- Determining whether a disciplinary removal that results in a change in placement is a manifestation of a child's disability.



QUESTIONS?

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